



POLICE DEPARTMENT CITY OF NEW YORK

May 11, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Anthony Cimmino
Tax Registry No. 933693
121 Precinct
Disciplinary Case No. 2015-13209

Lieutenant Denis Samuylin
Tax Registry No. 935680
71 Precinct
Disciplinary Case No. 2015-13210

Charges and Specifications:

Disciplinary Case No. 2015-13209

1. Said Police Officer Anthony Cimmino, on or about February 1, 2014, at approximately 1220 hours, while assigned to the 121st Precinct and on duty, in the vicinity of 2246 Forest Avenue, Richmond County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he stopped Kern Packette without sufficient legal authority.
P.G. 203-10 Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT
2. Said Police Officer Anthony Cimmino, on or about February 1, 2014, at approximately 1220 hours, while assigned to the 121st Precinct and on duty, in the vicinity of 2246 Forest Avenue, Richmond County, used offensive language, in that he made a discourteous and disrespectful remark to Kern Packette by using the word fuck.
P.G. 203-09 Page 1, Paragraph 2 - PUBLIC CONTACT - GENERAL
3. Said Police Officer Anthony Cimmino, on or about February 1, 2014, at approximately 1220 hours, while assigned to the 121st Precinct and on duty, in the vicinity of 2246 Forest Avenue, Richmond County, acted discourteously toward Kern Packette in that he threw Kern Packette's driver's license, vehicle registration, and a disorderly conduct summons onto the hood of Kern Packette's vehicle.
P.G. 203-09 Page 1, Paragraph 2 - PUBLIC CONTACT - GENERAL
4. Said Police Officer Anthony Cimmino, on or about February 1, 2014, at approximately 1220 hours, while assigned to the 121st Precinct and on duty, in the vicinity of 2246 Forest Avenue, Richmond County, engaged in conduct prejudicial to the good order,

efficiency or discipline of the New York City Police Department, in that he issued a summons to Kern Packette for Disorderly Conduct (P.L. 240-26-6, congregate with other persons and refuse to comply with police order to disperse), without sufficient legal authority.

P.G. 203-10 Page 1, Paragraph 5 - PUBLIC CONTACT – PROHIBITED
CONDUCT

Disciplinary Case No. 2015-13210

1. Said Sgt. Denis Samuylin, on or about February 1, 2014, at approximately 1220 hours, while assigned to the 121st Precinct, in the vicinity of 2246 Forest Avenue, Richmond County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he permitted his subordinate, P.O. Anthony Cimmino (Tax Reg #933693) to behave discourteously to Kern Packette and to issue Kern Packette an improper summons.

P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED
CONDUCT

Appearances:

For CCRB-APU: Jonathan Fogel, Esq.
Civilian Complaint Review Board
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New York, New York 10007

For Respondents: Michael Martinez, Esq.
Worth, Longworth & London, LLP
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New York, New York 10038

Philip Karasyk, Esq.
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New York, New York 10279

Hearing Dates:

January 19, and January 26, 2016

Decision:

Respondent Cimmino: Not Guilty of Specification 1; Guilty of Specification 2; Not Guilty of Specification 3; Guilty of Specification 4.

Respondent Samuylin: Not Guilty

Trial Commissioner:

ADCT Paul M. Gamble

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on January 19 and 26, 2016. Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. Civilian Complaint Review Board (CCRB) called CCRB Investigator Jennifer Jarett, Kern Packette and Nigel Loney as witnesses. Respondents testified on their own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Cimmino Not Guilty of Specification 1; Guilty of Specification 2; Not Guilty of Specification 3; and Guilty of Specification 4. I find Respondent Samuylin Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

The following is a summary of the facts which are not in dispute.

On February 1, 2014, Kern Packette was driving a GMC Denali sport utility vehicle in the vicinity of the A & J Tire Shop, located at 2246 Forest Avenue, Staten Island, New York. Packette is a 37-year old former immigration official with the government of Trinidad and Tobago, who now works for a private employer in Danville, Pennsylvania as a data analyst (Transcript "T" 62, 64). Packette works during the week in Pennsylvania and spends weekends on Staten Island. Packette's five-year old son was seated in a car seat in the second row of the passenger cabin¹. Packette's car was registered in Pennsylvania and bore a single Pennsylvania

¹ Packette's car was a seven passenger SUV and had three rows of seating.

license plate in the rear, in accordance with Pennsylvania Department of Motor Vehicle regulations. At approximately 1220 hours, Packette turned into the parking lot of the A & J Tire Repair shop located at 2246 Forest Avenue. Shortly thereafter, Packette was approached by Respondents Cimmino and Samuylin, who had driven up behind him in their police vehicle. Respondent Cimmino approached the driver's side of the car and initiated a verbal exchange, during which Cimmino asked Packette for his license and registration. At some point, Packette questioned Respondent Cimmino about the reason he had been stopped. Packette and Cimmino had a further verbal exchange, after which Cimmino ordered Packette to step out of his car.

Once outside his car, Packette had a further verbal exchange with Respondent Cimmino dealing with Packette's concern over his inability to see his son from the rear of his car. Respondents Cimmino and Samuylin then returned to their police vehicle while leaving Police Officer Barriero with Packette. Respondent Cimmino eventually left the police vehicle, returned Packette's documents to him and issued him a summons for Disorderly Conduct.

The issues in this case are: (1) whether Respondent Cimmino had sufficient legal authority to stop Packette; (2) whether Respondent Cimmino was discourteous to Packette in that he used offensive language directed toward him; (3) whether Respondent Cimmino was discourteous to Packette in that he threw Packette's driver's license, registration and a disorderly conduct summons onto the hood of Packette's vehicle; (4) whether Respondent Cimmino issued a Disorderly Conduct summons to Packette without sufficient legal authority; and (5) whether then-Sergeant Samuylin permitted Respondent Cimmino to behave discourteously to Packette and to issue Packette an improper summons.

Having considered the testimony, evidence and arguments put forth by the parties, I find that: (1) Respondent Cimmino had sufficient legal authority to stop Packette; (2) Respondent

Cimmino was discourteous to Packette in that he used offensive language toward him, specifically the word "fuck;" (3) Respondent Cimmino did not show discourtesy to Packette by throwing his license, registration and a summons onto the hood of his car; (4) Respondent Cimmino did issue a Disorderly Conduct summons to Packette without sufficient legal authority; and (5) Respondent Samuylin did not fail to supervise in that he permitted Respondent Cimmino to behave discourteously to Packette and to issue an improper summons. What follows is a summary of the evidence presented by the parties which is relevant to the disputed facts.

Prior to making the turn into the A & J repair shop, Packette recalled passing a police vehicle going in the opposite direction (T. 76). As he brought his car to a stop, Packette recalled seeing customers and service staff present at the shop (T. 79-80). Packette stepped out of his car, leaving the engine running, seeking service (Id.). At that point, he noticed that a police vehicle pulled up behind him (Id.). Packette testified that Respondent Cimmino ordered him back into his car and he complied (Id.). Packette's car had tinted windows (T. 64).

Packette testified that after he rolled down the driver's side window, Respondent Cimmino walked up to his car and ordered him to roll down his other windows (T. 80-81). Packette had a Pennsylvania registration displayed on his windshield, along with an E-Z Pass tag (T. 65-66). Respondent Cimmino asked Packette for his license and registration, which he handed over (T. 81).

Packette asked Respondent Cimmino what he had done wrong and initially received no response (T. 82, 114). When Packette continued questioning why he was stopped, Cimmino eventually told him that he "looked suspicious" (Id., 114). After Packette continued pressing him for a further explanation, Respondent Cimmino told him he was stopped because he had a Pennsylvania plate with an E-Z Pass tag in front (Id.). Packette protested that there was nothing

illegal or improper about that when Respondent Cimmino told him "Shut the fuck up" (T. 82-83). Packette replied, "Please don't use that kind of language in front of my son" (Id.). Respondent Cimmino then said, "I don't give a fuck about your son; get out of the car" (Id., 119).

Packette stepped out of his car and was directed by Respondent Cimmino to step to the rear. Packette protested, saying "I am not complying to come to the rear of the vehicle because I want to stay in full view of my son since you just said you don't care about my son" (T. 84). At that point, Respondent Samuylin told Packette that he needed to listen and proceed to the back of the car (Id.) Packette again refused, saying "I understand but I'm not going to leave my son" and stayed by the driver's door (T. 85). Police Officer Barreiro told Packette to listen to the other officers because the situation could escalate (Id.). Packette then said, "I understand that but have I done anything wrong? Why are you – you say this could escalate to a point and I haven't done anything wrong. But I'm not leaving my son. If I'm going to the rear of the vehicle, I'm bringing my son with me. In fact, I don't think that you are lawfully stopping me. I don't think you – you know, you're lawfully doing what you're supposed to. Can I get your information?" (Id.).

Respondents Cimmino and Samuylin then returned to their police vehicle, while officer Barreiro remained with Packette outside his car (T. 86). Respondent Cimmino eventually returned to Packette's car, threw his license, registration and a summons on the hood, saying, "Deal with that" (T. 92). At that point, the three police officers entered their vehicle and drove off (Id.).

Packette testified that during the encounter, the owner of the tire shop approached Respondents and asked them to move their police vehicle forward because they were blocking

the entrance (T. 89). After the police left the tire shop, Nigel Loney, among others, approached him, asked if he was okay and what the encounter was all about (T. 91-92). Packette recognized Loney from his Staten Island neighborhood as a fellow Trinidadian but did not know his name at that time (T. 93). Packette met Loney the next weekend in a chance encounter in which Loney volunteered to assist him if he were to pursue a complaint against the police (T. 130-131). At that point, Packette and Loney exchanged personal and contact information. Packette was informed by another acquaintance nicknamed "Super" that a mutual acquaintance, Sherrill Braithwaite, had been at the tire shop and had witnessed the encounter with the police (T. 94, 134-135). Packette had previously met Brathwaite, another fellow Trinidadian, in an official capacity when he was employed by the Trinidadian Consulate in Manhattan (T. 94).

Packette testified that he e-mailed a complaint to CCRB the same day as the incident T. 188). In his complaint, he alleged that he was stopped by Respondents because of his race (T. 198, 200 201). He testified further that he declined the opportunity to mediate the complaint because he lacked confidence that he could cause any positive change in police behavior unless he were "to see the process all the way through" (T. 154-155). Packette testified further that the summons issued to him was eventually dismissed when he appeared in court (T. 122).

Nigel Loney testified that he is a 43 year old bus operator employed by the Metropolitan Transportation Authority (T. 206). Prior to February 1, 2014, Loney knew Packette only by face through his association with other Trinidadians who lived in his neighborhood (T. 206-207). On the date of the incident, Loney was in the A & J Tire Repair shop and observed the interaction between Packette and the police from a distance. Loney was able to hear Respondent Cimmino direct Packette back into his car and ask him for his license and registration (T. 207). Loney testified that he also heard Cimmino telling Packette to "shut the fuck up" (T. 208-209, 217).

Loney testified that he heard Packette ask Respondent Cimmino, "Why do you have to speak that way in front of my son?" (Id.). Loney testified further that he heard Packette refusing to move to the rear of the car because he did not want to be out of sight of his son (T. 210-211). Loney also testified that he observed Respondent Cimmino toss Packette's papers on the hood of his car at the end of the encounter (T. 211). Loney conceded that he had made a statement to CCRB in which he had stated that Respondent Cimmino had thrown the documents on the dashboard of Packette's car (T. 229). Loney testified that he was motivated to appear in court because he believed that the behavior he witnessed Respondents engage in was "unprofessional and needed to be curbed" (T. 213, 233).

CCRB offered the hearsay statement of Sherrill Braithwaite through Investigator Jennifer Jarrett (CCRB Exhibits 2A, 2B). As set forth in the transcription of her statement, Brathwaite was walking past the tire shop at 2246 Forest Avenue on her way back from a wire transfer office when she recognized Packette in the midst of a discussion with three uniformed police officers (Brathwaite Transcript "BT" 7, 9). Brathwaite recognized Packette as a Trinidadian consular official who had assisted her in the past with a passport issue (BT 21-22). Brathwaite did not remember the race of the police officers but recalled that their police vehicle was parked behind Packette's car (BT 8). Brathwaite recalled that Packette was out of his car and further recalled seeing him handing what appeared to be documents to the officers (Id., 13-14). Brathwaite estimated that she was two to three yards away from Packette and Respondents (BT 11). According to Brathwaite, it appeared that the police were trying to get Packette to move to the rear of his car but he balked, expressing concern for his son. Brathwaite recalled hearing one police officer say, "I don't care about your fucking son" (BT 9, 15, 16-17). Brathwaite said she remembered the language because the profanity stuck out in her mind (Id.). She observed one of

the police officers throw down Packette's documents on the hood of the police vehicle (T. 18). At the time of the incident, Brathwaite observed that there were other patrons in and near the service bays of the shop but that no one moved toward the confrontation (BT 20). Brathwaite stated that she made sure Packette saw her there before she walked away (BT 21).

Respondent Cimmino testified that he was on patrol on February 2, 2014 driving southbound on Forest Avenue when he observed a car driving in the opposite direction with no front plate and two stickers on the windshield (T. 259). At that point, he suspected that the car might be stolen (T. 261). He turned his police vehicle around and began following the car (T. 261-262). Respondent Cimmino was accompanied in the police vehicle by Respondent Samuylin and Police Officer Barriero (T. 257). As he caught up with the car, Respondent Cimmino noticed that the rear plate appeared to be from Pennsylvania (T. 262). Respondent testified that once he saw that plate, his intention was to let the driver proceed with a warning (Id.). Respondent Cimmino turned on his lights and siren (T. 263-264).

As Respondent Cimmino left his police vehicle, the driver of the car left his at the same time and began yelling, "The fuck did you stop me for? You fucking had no reason to stop me. You stopped me because I'm black. You're racist. You don't know what the fuck you're doing" (T. 264-265). Respondent Cimmino ordered him back into his car three times before Packette re-entered it (T. 266). Respondent Cimmino testified that his suspicions were raised because "people who are stopped by the police and have nothing to hide don't usually jump out of their cars and start screaming at us; they sit and wait for us to come to them" (Id.). Packette again questioned why Respondent Cimmino had stopped him and accused Cimmino, saying "you stopped me because I'm black; you're a racist" (Id.). At that point, Respondent Samuylin came around to the passenger side of the car and asked Packette to provide his license and registration

(Id.). While standing near the driver's door, Respondent Cimmino noticed a sticker and an E-Z Pass tag on the windshield (T. 267-268). Respondent Cimmino took the documents, returned to his police car and wrote a summons for disorderly conduct (T. 269). According to Respondent Cimmino, Packette's actions in leaving his vehicle, cursing at the police officers, and flailing his arms, in view of 10-12 witnesses, disrupted the business (T. 270). Respondent Cimmino conferred with Respondent Samuylin prior to writing the summons and Samuylin approved its issuance (Id.).

When Respondent Cimmino tried to return the documents to Packette, he refused to accept them and began shouting obscenities at Cimmino (T. 270). Respondent Cimmino attempted to speak to Packette but was unable to do so because of Packette's tirade (Id.). Respondent Cimmino then placed the summons and Packette's documents on the dashboard of his car (T. 27-271). Respondent Cimmino then stepped back and Respondent Samuylin approached Packette, directing him to step out of the car (T. 271). Packette eventually went to the rear of his car with Respondent Samuylin, where he explained to Packette the reasons for the stop (T. 273). Packette then returned to his car and Respondents returned to their police vehicle (Id.).

Packette left his car once again, walked to the police vehicle and asked Respondents for their names and shield numbers (272-274). Respondent Cimmino gave Packette a pen to write down the information (Id.). At the conclusion of this exchange, Packette returned to his car and Respondents drove away (Id.). Respondent Cimmino denied using any profanity during this encounter and further denied placing Packette's documents on the hood of his car (T. 274-275).

Respondent Cimmino acknowledged that he charged Packette with subsection 1 of Penal Law Section 240.20, a violation of which occurs when a person "engage[s] in fighting or violent,

tumultuous or threatening behavior.” Respondent Cimmino testified that the narrative in the summons he issued Packette read “disobeying police orders” although he intended to write “violent, threatening behavior, creating public disorder, annoyance and alarm” (T. 277).

Respondent Cimmino testified further that the police orders Packette allegedly disobeyed were orders to get back in his car and to roll down his windows (Id.). When he was confronted at his CCRB interview about whether he believed that Packette had violated subsection 6 of Penal Law Section 240.20, a violation of which occurs when “a person congregates with others in a public place and refuses to comply with a lawful order of the police to disperse,” Respondent Cimmino indicated that he did (T. 293). At trial, Respondent Cimmino conceded that Packette was not in violation of that section of the disorderly conduct statute.

Respondent Cimmino conceded that while his attention was drawn to Packette’s vehicle because it lacked a front license plate, once he observed that it had a Pennsylvania license plate affixed to the rear, it was possible that his car was indeed lawfully registered (T. 309). Nevertheless, Respondent Cimmino testified that he demanded Packette’s license and registration before scrutinizing the stickers in Packette’s windshield because he planned to “confront” him before examining the stickers (T. 310).

Respondent Samuylin testified that he was on patrol with Respondent Cimmino that day and noticed a car traveling in the opposite direction from the police vehicle in which he was riding (T. 349-350). According to Respondent Samuylin, the aforementioned car appeared to be traveling at a higher rate of speed than normal (T. 350). Respondent Samuylin noticed that the car had no front license plate and further noticed what appeared to be a “New York City temporary registration and a New York state inspection sticker” on the windshield (Id.).

Respondent Samuylin testified that he suspected the car was stolen based upon “the 121 Precinct,

the area where the motorist was coming from” having “numerous vehicle larcenies” during the previous month (T. 352). Respondent Samuylin confirmed with Cimmino that he had not observed a front license plate and they agreed to stop the car (Id.). Respondent Cimmino, who was the operator, made a U-turn and caught up to the car on Forest Avenue (Id.). Respondent Samuylin recalled Respondent Cimmino activating the lights and siren as the car was turning into a tire shop (T. 353).

Respondent Samuylin testified that once Respondent Cimmino pulled their police vehicle up behind the suspect car, he got out of the front passenger seat (Id.). Respondent Samuylin heard a loud voice coming from the front of the car but could not tell whose voice it was (Id.). Respondent Samuylin testified further that when the motorist rolled down his windows, he learned that it was Packette shouting obscenities at Respondent Cimmino (T. 354). Respondent Samuylin testified that he heard Packette say, “This is fucking bullshit. You pulled me over for nothing. I didn’t do anything wrong. You pulled me because [you’re] racist. You pulled me because I’m black. You’re fucking racists” (Id.). Respondent Samuylin approached the passenger side of Packette’s car and noticed movement in the back seat through the tinted windows (T. 355). Respondent Samuylin directed Respondent Cimmino to have Packette lower the windows; after 20-30 seconds, the windows went down and he observed a little boy on the back seat (Id.). Respondent Samuylin then went around the rear of Packette’s car to the driver’s side, where he joined Respondent Cimmino and Officer Barriero. Respondent Samuylin testified that Packette continued a “barrage of profanity” and would not allow Samuylin to calm him down or to explain the reason for the stop (T. 356). Respondent Samuylin noticed Respondent Cimmino observing the stickers on Packette’s windshield (Id.). Respondent Cimmino then told Respondent Samuylin that “it was an E-Z pass” (Id.).

Respondent Samuylin testified that Packette refused to provide his license and registration, raising his suspicion that he was unlicensed or had an open warrant (T. 357). According to Respondent Samuylin, while this encounter was ongoing there were three people on the premises who began walking toward them (T. 358). Respondent Samuylin ordered them to step back and two of them did so but a third continued to advance on him (T. 358). Respondent Samuylin later clarified on cross-examination that the third person started a conversation with him, asking him how long the police would be in the lot because he had customers who were trying to depart (T. 382). After obtaining Packette's license and registration, Respondents Samuylin and Cimmino returned to their police vehicle, where they conducted Department of Motor Vehicle checks on the license and registration. According to Respondent Samuylin, there were "no hits" (T. 359).

At that point, Respondent Samuylin directed Respondent Cimmino to issue a summons to Packette for violating subsection 1 of the Disorderly Conduct statute (Id.). Respondent Samuylin testified that he believed Packette had engaged in "violent, threatening or tumultuous behavior" and "the fact that the person was cursing at us while other people were present, making other people alarmed, annoyed" (T. 360). Respondent Samuylin denied hearing Respondent Cimmino utter any profanities during his encounter with Packette (T. 361).

On cross-examination, Respondent Samuylin stated that even though he noticed that Packette had a Pennsylvania plate on his car, that fact did not necessarily mean that the car was registered in Pennsylvania (T. 374). Respondent Samuylin maintained that even after he later saw a Pennsylvania registration sticker on the windshield of Packette's car, it was still only a possibility that the car was lawfully registered (T. 391). When challenged on his awareness of the Pennsylvania requirement that cars need only bear one plate, Respondent Samuylin

responded, “Depends on which county. There are some counties that require two plates; there are some counties that require one plate” (T. 375, 406-407). Respondent Samuylin conceded that while he was concerned that Packette constituted a potential threat for approximately three to four minutes when he was “non-compliant,” neither he nor Respondent Cimmino ordered him out of his car or frisked him (T. 389-390). Respondent Samuylin further testified that Packette prolonged the car stop by his own actions in refusing to permit Samuylin to explain to him why he had been stopped (T. 392). Finally, Respondent Samuylin insisted that Respondents had not made a mistake; they were simply acting on the information they possessed at that time (T. 391).

Given these two irreconcilable views of the evidence, I credit Packette’s testimony as credible, logical and supported by the other evidence in the record. Packette testified in a direct, forthright manner at trial. While Packette admitted on cross-examination that he claimed on his CCRB complaint that he had been the victim of racial profiling, that assertion alone has no bearing on his credibility. While it was, at best, speculation on his part as to a reason for the behavior he complained of, he did not attempt to embellish the facts in his testimony to make a more persuasive claim. It should be noted that Respondents are not charged with violating the Department policy on racial profiling and there is no evidence in the record to support an inference of racial animus on their part. I similarly find no evidence of anti police bias motivating any of the witnesses called by CCRB. Both Packette and Loney testified that they were motivated to pursue the complaint, and to support the complaint, respectively, because Respondents’ actions that day were unprofessional and should not be tolerated.

I credit Respondent Cimmino’s testimony with respect to his rationale for following Packette and initiating an encounter with him in the parking lot. I do not credit Cimmino’s testimony regarding the facts of his encounter with Packette because it was illogical, internally

inconsistent and exaggerated. In order to credit his testimony, this tribunal would have to believe that a man who had broken no law, accompanied by his five-year old son, stepped out of his vehicle unprompted by the police and commenced a verbal harangue which accused them of stopping him because of his race. While it is certainly possible, perhaps even likely, that someone who has been stopped by the police for no reason that they can discern would become aggravated, I find the scenario described by Respondent Cimmino to be exaggerated and I decline to adopt it. The scenario Respondent Cimmino described was self-serving and calculated to make Packette appear belligerent and Cimmino, by comparison, calm and professional. These inconsistencies support an inference that Respondent Cimmino's testimony was an after-the-fact attempt to evade responsibility for his actions that day. I further find that Respondent Cimmino, through his testimony, attempted to trivialize the legitimate issue of racial profiling in an attempt to cast doubt upon Packette's credibility.

I similarly find that Respondent Samuylin's testimony was self-serving and at points, gratuitous. The substance of his testimony essentially mirrored Respondent Cimmino's, in that he characterized Packette as an out of control citizen who accused them of racial profiling while they were simply attempting to investigate a suspicion of a stolen vehicle. Respondent Samuylin's in-court demeanor, as well as the substance of his testimony, invite the conclusion that his statements were after-thoughts tailored to bolster his defense.

1. Stop Without Legal Authority

Based upon the credible evidence in the record, I find that Respondent Cimmino had sufficient legal authority to stop Packette.

Packette testified credibly that he exited his car in order to obtain service at the tire shop, having no connection with police attempting to pull him over. Packette testified that he became

aware of the police when he saw them pull up behind him in the lot and then direct him to go back into his vehicle. Respondent Cimmino testified, also credibly, that he activated his lights and siren prior to Packette making the turn from the main road into the parking lot. These two factual assertions are not necessarily in conflict; thus, the facts do not support a finding that Cimmino actually caused Packette to pull over through the use of his lights and siren.

Nevertheless, the range of permissible investigatory steps available to Respondent Cimmino under those circumstances is still informed by the reasonableness standard of the Fourth Amendment, as well as his good faith.

An officer need only possess an articulable reason to make an inquiry of the driver; the reason for the approach need not be based on any indicia of criminality" (Kamins, New York Search and Seizure, § 5-02; People v. DeBour 40 NY2d 210, 223 [1976]). "If a police officer's approach is based on no more than idle curiosity, the inquiry will be improper" (Kamins, New York Search and Seizure, § 5-02; People v. Allende, 39 NY2d 474 [1976]).

Respondent Cimmino's testimony establishes by a preponderance of the credible evidence that he believed, albeit mistakenly, that Packette's vehicle was a New York vehicle based primarily on the presence of what Cimmino thought were two stickers on the windshield and the absence of a front license plate. This perception is consistent with the requirement in the New York Vehicle and Traffic Law that a vehicle bear a registration sticker and an inspection sticker on the windshield, as well as two license plates. As Respondent Cimmino later learned, what he thought were two stickers turned out to be a Pennsylvania registration sticker and an E-Z Pass tag. Based upon that misperception, Respondent Cimmino discounted the presence of the Pennsylvania license plate affixed to the rear because, according to his thought process at the time, the presence of a single license plate on a New York vehicle was evidence that the car may

have been stolen, rather than evidence that it was, in fact, a car which was lawfully registered in Pennsylvania. Based upon the limited opportunity for observation Respondent Cimmino had as his police vehicle passed Packette's car as they drove in opposite directions, it was reasonable for Cimmino to investigate further by following Packette into the parking lot.

Accordingly, Respondent Cimmino possessed reasonable suspicion that Packette was driving a stolen car. The reasonable suspicion standard does not require mathematical certainty and permits police officers to be mistaken about a suspicion; nevertheless, it requires that the suspicion be a reasonable one, supported by objective facts (see *Terry v. Ohio*, 392 US 1, 27 [1968])[in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience]).

While Respondent Cimmino's observations did not include any of the more common indicia of stolen cars, they were processed through the filter of his recent experiences in apprehending suspects in several stolen car cases (see, *People v. Bramble*, 158 Misc.2d 411, aff'd 207 AD2d 407 [2d Dept. 1994][missing trunk lock]; *People v. Vento*, 259 AD2d 642 [2d Dept. 1999][broken trunk lock]; *People v. Safoschnik*, 238 AD2d 448 [2d Dept. 1997][missing door lock]; *People v. Brown*, 215 AD2d 771 [2d Dept. 1995][damaged door lock]; *People v. Angelillo*, N.Y.L.J. 3/21/95 [Sup. Ct. New York County 1995]; aff'd 232 AD2d 319 [1st Dept. 1996][driver's door handle broken and hanging off, broken window on car covered with garbage bag]).

Improper police action is punishable only if an officer acted "with knowledge that he was [acting] improperly, acted without concern for the propriety of his actions, or acted without due and reasonable care that his actions be proper" (*Police Department v. Ortiz*, OATH Index No.

1626/97, report and recommendation at 10-11 [Nov. 19, 1997] *modified on penalty*, Comm'r Decision. [Feb. 3, 1998]; *Police Department v. Hoffman*, OATH Index Nos. 1005-06/98 [Apr. 13, 1998]; *Police Department v. Wang*, OATH Index No. 657/98 [Jan. 12, 1998]). In this case, while Respondent Cimmino's initial suspicions were ultimately proven wrong, he acted in good faith.

Based upon the foregoing, I find Respondent Cimmino Not Guilty of Specification 1.

2. *Discourtesy – Language*

Based upon the credible evidence in the record, I find that during the course of their encounter at the tire shop, Respondent Cimmino was discourteous to Packette by using the word "fuck" at least twice: first, when that he told Packette to "shut the fuck up," and second, when he told Packette "I don't give a fuck about your son." These statements were overheard by Nigel Loney and Sherrill Brathwaite, respectively, who corroborated Packette's assertion that Respondent Cimmino used profanity during the course of their interaction. Loney and Brathwaite, despite their prior acquaintance with Packette, were disinterested witnesses who happened to be in a position to observe parts of this interaction. Although Respondent Cimmino denied using profanity during his encounter with Packette, I find his denial incredible.

Respondent Cimmino's description of Packette's behavior during the encounter is self-serving, defies common sense and is unworthy of belief. Common sense strongly suggests that citizens who are stopped by the police, in the absence of evidence of mental illness or intoxication, do not ordinarily behave in the manner Respondents described. To suggest that an otherwise competent individual would behave this way while exercising responsibility for their five-year old child and subject that child to the full range of police action is unlikely.

Based upon the foregoing, I find Respondent Cimmino Guilty of Specification 2.

3. Discourtesy Throwing Documents on Hood

I find that there is insufficient credible evidence in the record to support a finding that Respondent Cimmino threw Packette's papers on the hood of his car. I make this finding because of the conflicting recollections of the witnesses, specifically Packette and Loney. Loney's in-court testimony was that he observed Respondent Cimmino throw Packette's documents on the hood of his car, corroborating Packette's statement in that regard. Loney, however, conceded that in his statement to CCRB, he stated that Respondent Cimmino threw the documents onto Packette's dashboard. Loney later corrected himself in the same statement to CCRB and said "hood." This discrepancy, although perhaps inadvertent, is noteworthy because Loney's initial recollection appears to corroborate to some degree Respondent Cimmino's in-court testimony regarding where he placed Packette's documents.

Based upon the foregoing, I find Respondent Cimmino Not Guilty of Specification 3.

4. Issuing Summons Without Sufficient Legal Authority

Based upon the credible evidence in the record, I find that Respondent Cimmino lacked a sufficient basis for the issuance of a summons for Disorderly Conduct. Penal Law Section 240.20 provides as follows:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose

(Penal Law § 240.20).

At the outset, I find that Respondent Cimmino's view that Packette's alleged failure to roll down his windows was an insufficient basis for the issuance of a summons for Disorderly Conduct. The Penal Law does not criminalize any and all failures to obey police directives. Accordingly, the acts attributed to Packette on the summons, "disobeying police orders," whether charged under subsections 1 or 6, do not constitute a violation of the statute. Even assuming this tribunal were to overlook what Respondent Cimmino characterized as a mistake, there is insufficient evidence in the record to support a violation of any of the subsections of the Disorderly Conduct statute.

Based upon the foregoing, I find Respondent Cimmino Guilty of Specification 4.

5. Conduct Prejudicial to Good Order, Efficiency or Discipline

I find, based upon the credible evidence in the record, that Respondent Samuylin did not permit Cimmino to use profanity toward Packette and issue him a summons without sufficient justification.

a. Discourteous Language

As discussed above, I found Respondent Cimmino to have behaved in an unprofessional manner by using foul language toward Packette. While Respondent Cimmino's discourteous language was used within earshot of Respondent Samuylin and could not have escaped his notice, the language was used in the course of a car stop where it was, at least initially, tactically impractical to intervene as soon as Respondent Samuylin heard the first use of the expletive. Based upon the evidence in the record, the use of the foul language was limited to two outbursts, not a persistent verbal flagellation. Bearing in mind that Respondent Cimmino, as the individual using the epithet, is personally accountable for its use, the conduct was not so persistent that

Respondent Samuylin should be held accountable for witnessing Cimmino use it and taking no action.

b. Disorderly Conduct Summons

While Respondent Cimmino completed the summons he gave Packette at Respondent Samuylin's direction, there is no evidence in the record that Samuylin asked to review the summons or provided the narrative to Cimmino so that he could write it down. Moreover, since the factual statements made on a summons are provided under the penalties of perjury, it is Respondent Cimmino who is accountable for their accuracy.

Respondent Samuylin did testify that he asked Packette to join him at the rear of his car after the summons had been issued and attempted to explain why Respondents had stopped him. I credit Samuylin's testimony that he took this action in an attempt to ameliorate any residual bad feelings after the police action. In an ideal scenario, Respondent Samuylin would have proactively de-escalated the situation at the first sign of conflict, mindful that the entire encounter was unfolding in front of several citizens who have a vested interest in the manner in which the police conducted themselves. Respondent Samuylin's failure to meet this high standard represents a missed leadership opportunity but should not be the basis of a professional sanction.

Accordingly, I find Respondent Samuylin Not Guilty of this specification.

PENALTY RECOMMENDATIONS

In order to determine an appropriate penalty, Respondent Cimmino's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent Cimmino was appointed to the Department on January 20, 2004. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested that Respondent Cimmino forfeit 10 vacation days.

Respondents in previous cases have forfeited between five and ten days for car stops without sufficient legal authority (Disciplinary Case No. 84356-2008, signed December 14, 2010 [Ten-year detective with no prior disciplinary record forfeits five vacation days for conducting a car stop without authorization. The evidence did not support Respondent's assertion that the complainant was engaged in suspicious activity. In addition, Respondent pleaded guilty to losing his Activity Log.]; Disciplinary Case Nos. 12262-2009 & 968-2010, signed January 18, 2012 [Six-year police officer with no prior disciplinary history negotiated a penalty of ten vacation days for being discourteous to a suspect during a car stop by using profanity and for abusing his authority in issuing a summons to the suspect without any legal basis. In an unrelated incident, he also told an intoxicated arrestee, "shut up or I'll stick a nightstick up your ass"])).

In one case, Respondents forfeited ten and 15 days, respectively, for a car stop without sufficient legal authority, followed by an unlawful frisk and search (Disciplinary Case Nos. 2013-10682 & 2013-10683, signed January 30, 2015 [Eight-year detective with no prior disciplinary record forfeits ten vacation days for stopping complainant's vehicle without sufficient legal authority. Respondents testified that complainant refused to move his car to allow their van to pass, and that he also hurled profanity at them. Video evidence did not corroborate their account of the incident. Co-Respondent (ten-year detective with no prior disciplinary record) forfeits 15 vacation days for improperly frisking and searching complainant in addition to the car stop])).

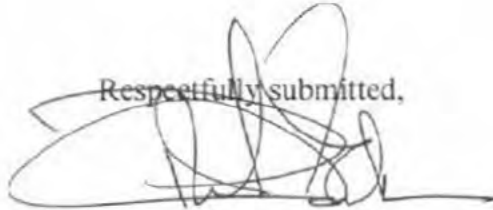
Respondents in previous cases have forfeited between two and five days for discourtesy in using profanity toward citizens (Disciplinary Case No. 78255-2002, signed July 16, 2003

[Respondent, a twenty-year veteran with one prior disciplinary adjudication forfeits five vacation days for having loudly stated, "You called me here for this fucking bullshit" after responding to a 911 cardiac call which was a guise to elicit a quick police response in order to have a drunk removed from a fast food restaurant prior to the lunch rush]; Disciplinary Case No. 2013-9862, signed June 17, 2014 [Nine-year police officer with no prior disciplinary record forfeits five vacation days for having been discourteous to a civilian by uttering the profanity "fucking" at the civilian and by asking him, "Don't you speak English?"]; Disciplinary Case No. 10315-2013, signed on February 13, 2015 [Five-year police officer with no prior disciplinary history negotiated a penalty of two vacation days for, being discourteous to an individual. in that, he stated in sum and substance, "shut the fuck up" and refused to provide said individual his shield number]; Disciplinary Case No. 2014-12026, signed September 2, 2015 [Eleven-year sergeant with no prior disciplinary record forfeits five vacation days for using discourteous language during a stop. Respondent called the stopped individual a "faggot" and told him, "Go back to the projects, I'll see you on the street. I'll see you in the hood"]).

Based upon the foregoing, I find that a penalty of seven vacation days is sufficient as a sanction for Respondent Cimmino. His conduct during the encounter with Packette was unprofessional and deterred him from completing the very investigation he initiated. Instead of gathering facts which would have either supported or refuted his suspicion that Packette was driving a stolen car, Respondent Cimmino chose to confront Packette instead of obtaining the information he sought with Packette's cooperation. Although Respondent Cimmino made a proffer of magnanimity by declaring his intention to let Packette "go with a warning," such an offer of generosity rings hollow when preceded by unprofessional conduct. In addition to the

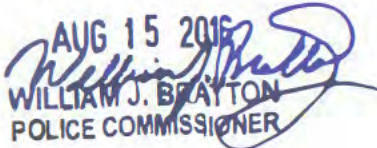
inherently offensive nature of the discourtesy and Respondent Cimmino's abuse of authority, I find his lack of candor with the tribunal to be an aggravating circumstance. Furthermore, based upon all the attendant circumstances, Respondent Cimmino's issuance of the summons appears to have been retaliatory.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Paul M. Gamble', written over the typed name.

Paul M. Gamble
Assistant Deputy Commissioner Trials

APPROVED

AUG 15 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER ANTHONY CIMMINO
TAX REGISTRY NO. 933693
DISCIPLINARY CASE NO. 2015-13209

On his last three annual performance evaluations Respondent twice received an overall rating of 4.5 "Extremely Competent/Highly Competent" and once received an overall rating of 4.0 "Highly Competent." [REDACTED]

From March 13, 2006 to May 10, 2007, Respondent was placed on Level 1 Force Monitoring for having three or more CCRB complaints in one year. From July 13, 2010 to August 18, 2011, Respondent was again placed on Level 1 Force Monitoring for the same reason.

He has no prior formal disciplinary history.

Paul M. Gamble
Assistant Deputy Commissioner Trials